No. 15715

United States Court of Appeals

FOR THE NINTH CIRCUIT

VAUGHN CECIL COWELL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

JEREMIAH M. LONG
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

THE BALLARD NEWS, SEATTLE, WASHINGTON — 4/9/58 — 15 COPIES

No. 15715

United States Court of Appeals

FOR THE NINTH CIRCUIT

VAUGHN CECIL COWELL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

JEREMIAH M. LONG
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

THE BALLARD NEWS, SEATTLE, WASHINGTON — 4/9/58 — 45 COPIES

INDEX

TABLE OF CASES

No. 15715

United States Court of Appeals

FOR THE NINTH CIRCUIT

VAUGHN CECIL COWELL,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Appellee accepts appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

ARGUMENT

I.

Appellant's contention with regard to the court's instructions to the jury and the testimony of an accomplice appears to be that the court should have instructed the jury that a conviction cannot be based on the testimony of an accomplice without corroboration. Appellant cites in support of his contention *Kearns* v. *United States*, 9 Cir. 27 F. 2d 854 and *Holmgren* v. *United States*, 1909, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861. It is submitted that neither the *Kearns* case nor the *Holmgren* case stand for this proposition and that the law does not require the court to give an instruction that the testimony of an accomplice is insufficient upon which to base a conviction unless corroborated nor indeed any instruction with regard to the value of accomplice testimony.

The United States Supreme Court in 1916 in the *Diggs* and *Caminetti* cases, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, set forth the requirements which the law imposes upon a trial judge in instructing the jury where there was testimony of an accomplice. There it was urged in the trial court that an instruction be given that the testimony of accomplices was to be received with great caution and believed only when corroborated by other testimony adduced in the case.

The instruction was not given and the trial court did not instruct in any manner as to the value of the testimony of an accomplice. This court affirmed, 220 F. 545, and the United States Supreme Court in affirming said at page 495:

> "In Holmgren v. United States, 217 U.S. 509, 54 L.Ed. 861, 30 S.Ct. Rep. 588, 19 Ann. Cas. 778, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them 1 Bishop, Crim. Proc. 2d Ed., § 1081, and cases cited in the note."

That the trial court's instruction with regard to the value of the testimony of an accomplice which appears at page 5 of appellant's brief is an accurate statement of the law, is obvious in view of the *Diggs* and *Caminetti* decisions, *supra.* See also *United States* v. *Scoblick*, 3 Cir. 1955, 225, F. 2d 779; *Stoneking* v. *United States*, 8 Cir. 1956, 232 F. 2d 385, cert. den. 352 U.S. 835, 77 S.Ct. 54, 1 L.Ed. 54; *United States* v. *Bucur*, 7 Cir. 1952, 194 F. 2d 297; *Ballard* v. *United States*, C.A.D.C. 1956, 237 F. 2d 582, cert. den. 352 U.S. 1017, 77 S.Ct. 574, 1 L.Ed. 2d 554.

In connection with the analysis of the *Holmgren* and *Kearns* cases which appears in appellant's brief, this court is referred to its opinion in *Mims* v. *United States*, unreported March 28, 1958, No. 15,654, wherein it is stated at page 2 as follows:

> "The Supreme Court considered this same problem (the necessity of instructions to the jury that testimony of accomplices are to be received with great caution and believed only when corroborated by other material testimony adduced in the case) in an appeal from this Court in the famous *Diggs* and *Caminetti* cases. (1917, 242 U.S. 470, 495.) There this Court has held (1915), 220 F. 545, 552) that a refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed. This despite the fact that in *Holmgren* v. *United States*, 1910, 217 U.S. 509, the Supreme Court had stated it was 'the better practice' to so instruct. In 1915, this Court recognized that while it might well be the better practice, 'no court, state or federal, has held that it is reversible error to refuse to so caution the jury.' 220 F. at 552.
>
> "In *Holmgren*, *supra*, a specific instruction on the subject was requested. However, it was not in proper form, for it named the alleged accomplice, as such. The fact of the witness being an accomplice was in dispute at the trial. In the *Diggs* and *Caminetti* cases the instruction requested was in proper form, leaving the finding as to whether either of the persons involved were accomplices to the jury, and requesting the admonition of care and caution to be applicable only after such finding. The instruction was refused. This Court held the general instructions given were sufficient and that there was no error. In reviewing the matter and in affirming this Court's holding of

> no error in the trial court's refusal of the instruction offered, the Supreme Court (242 U.S. 470, 495) cited the *Holmgren* case and stated that 'there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them'."

Further, in connection with appellant's contention with regard to the trial court's instruction on the value of accomplice testimony, it is pointed out that no proposed written instruction on this subject was presented to the trial court as required by Rule 30, nor was a copy of any such proposed instruction served upon counsel for the Government. See *Schuermann* v. *United States*, 8 Cir. 1949, 174 F. 2d 397, 401, cert. den. 338 U.S. 831, 70 S.Ct. 69, 94 L.Ed. 505.

II.

In his argument under Point 2, the appellant contends that the trial court erred in commenting on the evidence during its instructions to the jury. The comment referred to by the appellant appears at page 25 of the transcript as follows:

> "The Court: Ladies and gentlemen, I told you that the function of the Judge or the Court, as we call it, is different from that of the jury, but my attention has been called to the fact that I failed to specifically point out that you are the sole and exclusive judges of the facts and the credibility of all witnesses, and the rules which I laid down for you are merely the rules which are to govern you in your deliberations of those facts.

> Under the law, a federal judge has the power to sum up the evidence and to suggest conclusions thereon either as to the guilt or innocence of a defendant or the credibility of witnesses or any any other feature in the case. I did not exercise that option except in one instance for the purpose of telling you what I regarded to be extraneous evidence; that is, you will recall that I said the FBI is not on trial and neither is the United States Attorney, and the only fact in question was whether the defendant is or is not guilty. I made that as a part of a comment. You are not bound by that statement although I think it is a true statement."

In support of his contention appellant cites the case of *McAllister* v. *United States*, C.A.D.C. 1956, 239 F. 2d 76. It is submitted in connection with this point that a proper reading of the *McAllister* case does not involve the question of whether or not the trial court's remark was or was not prejudicial but simply the issue of whether or not that question could be raised on appeal where no exception was taken to the remark during the trial.

An accurate statement of the power of a trial court to comment on the evidence is contained in *United States* v. *Stayback*, 3 Cir. 1954, 212 F. 2d 313, cert. den. 348 U.S. 911, 75 S.Ct. 289, 99 L.Ed. 714 at page 319:

> "It is no longer an open question that a judge of a court of the United States may, in his discretion, express his opinion on the evidence and the credi-

> bility of the witnesses. The only proviso is that the jury should be made to understand that it is in no way bound by any observations of the court, and that it is the sole judge with respect to the issues of fact."

In *Bernal-Zazuta* v. *United States*, 1955, 225 F. 2d 60, 62, this court said in connection with the trial court's comments to defense counsel during examination of a witness:

> "But this is not the rule in the federal courts, where the trial judge is not assumed to be an automaton, but is charged with responsibility to see that the trial is fair to the government as well as to the defendant and that it moves with speed consistent with justice. Furthermore, a trial judge, even in a criminal case, is not bound by the rule of some state courts, but is permitted to instruct the jury upon the facts and to comment upon the credibility of witnesses. *It is notable that in the incidents complained of here the court did not pretend to be dealing with the guilt or innocence of defendant.*" (Italics supplied)

Similarly, in the instant case, the comment objected to did not concern the guilt or innocence of the defendant or even the credibility of the witnesses and in view of the court's instruction that the jury was the sole and exclusive judge of the facts and the credibility of all witnesses, the comment complained of cannot be considered prejudicial. It is believed that the trial judge's comment that neither the FBI nor the United States Attorney was on trial in this case concerned

what the trial judge accurately characterized as "extraneous evidence".

Pon Wing Quong v. *United States*, 9 Cir. 1940, 111 F. 2d 751 involved an appeal from a prosecution for importing, facilitating the transportation of, concealing and facilitating the concealment of, opium where the presumption that opium found in the United States had been imported unlawfully was not rebutted. The trial judge commented in his instructions "I do not think it will be denied that this opium was imported into the United States from China," where there was no evidence of the source of this opium. This court disposed of the contention that the comment was prejudicial in the following sentence at page 758: "Whether it came from China or some other foreign state is of no importance." It is urged that the trial judge's comment objected to in this cause related to "extraneous evidence" which was of no importance in the trial.

CONCLUSION

It is submitted that neither of the two points raised in this appeal are meritorious and that no prejudicial error occurred during the trial. The appellee requests that the judgment be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

JEREMIAH M. LONG
Assistant United States Attorney